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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Corporation
1919 M Street, N.W., Room 222
Washington, DC 20554

**Re: Closed Captioning and Video Description of Video
Programming, MM Docket No. 95-176**

Dear Mr. Caton::

Pursuant to Section 1.415 of the Commission's Rules, we hereby transmit nine copies of Reply Comments of A&E Television Networks and Ovation. Please contact the undersigned if you have any questions in connection with this matter.

Sincerely,


Robert Corn-Revere

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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OFFICE OF SECRETARY

In the Matter of

Closed Captioning and Video Description
of Video Programming

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MM Docket No. 95-176

To: The Commission

**REPLY COMMENTS OF
THE A&E TELEVISION NETWORKS AND OVATION**

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Dated: March 31, 1997

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Before the
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REPLY COMMENTS OF
THE A&E TELEVISION NETWORKS AND OVATION

A&E Television Networks (including the A&E Network and The History Channel) and Ovation (together, the "Programmers"), through their attorneys, hereby submit reply comments in the above-captioned proceeding.

After reviewing the comments filed in this proceeding, Programmers renew their suggestion that the Commission adopt rules based on the following general principles:

- The Commission must balance captioning requirements with the economic impact on program providers, as the statute requires;
- Captioning requirements should not involve the Commission in micromanagement of programming practices;
- Captioning requirements should be consistent with the Commission's historic grant of jurisdiction;
- The timetable for implementing captioning requirements should realistically balance competing public interest needs;

- The Commission should adopt exemptions from the captioning requirements that take into account the particular economic situations of the affected industries.

Programmers' specific suggestions that flow from these principles, as explained more fully in the initial comments, are summarized in the Appendix, attached hereto. Additionally, Programmers endorse the Reply Comments filed in this proceeding by NCTA. By these reply comments, Programmers supplement these submissions with the following specific points:

I. THE COMMISSION SHOULD IMPOSE NO TIMETABLE FOR THE CAPTIONING OF LIBRARY PROGRAMMING BUT INSTEAD SHOULD USE ITS MANDATE REGARDING NEW PROGRAMMING AS A "LABORATORY" TO ASSESS THE EFFECTS OF CAPTIONING REQUIREMENTS.

Despite the fact that Section 713 of the Telecommunications Act clearly distinguishes new programming ("video programming first published or exhibited after the effective date of such regulation") and "library" programming ("programming first published or exhibited prior to the effective date of such regulation"), see Section 713(b)(1)-(2), some commenters advocate establishing deadlines for captioning library programming. The legislative history indicates that this distinction was created in the law to ensure that FCC rules would not inadvertently create a disincentive to air library programming. H.R. Rep. No. 204, 104th Cong., 1st Sess. 114 (1995). Various commenters pointed out that establishing a timetable for captioning for library programming would effectively prevent much of that programming from being aired in the future, a result clearly contrary to the Act. ^{1/}

^{1/} E.g., Comments of the Association of Local Television Stations at 14; NCTA Comments at 26-29.

In addition to this overriding policy concern, there are two important reasons why the Commission should decline to impose requirements on library programming. First, the Commission should recognize that existing marketplace developments coupled with the timetable for new programming will ensure that the total amount of captioned programming will increase over time. ^{2/} Second, and perhaps more importantly, the many comments filed in this proceeding indicate that captioning requirements entail a large number of complex issues that make it difficult for the Commission to predict the effect of its rules on the programming market. Where so many uncertainties exist, the potential for unanticipated adverse effects of a policy is quite high.

Consequently, the Commission should use its experience with the timetable for new programming as a "laboratory" before it considers imposing obligations on library programming. This is not to suggest that the issues with respect to the different types of programming are identical. If anything, the effect of rules on library programming presents a more complicated problem where it will be difficult to predict the rules' effect. Accordingly, it makes sense for the Commission to gauge the effect of any possible timetable based on actual experience. Only by doing so will the Commission be able to "maximize" the amount of captioned library programming in the marketplace.

^{2/} E.g., NAB Comments at 11.

II. THE COMMISSION SHOULD GIVE PROGRAM PROVIDERS A DEGREE OF FLEXIBILITY IN MEETING THE CAPTIONING TIMETABLE BY TAKING INTO ACCOUNT CURRENT VOLUNTARY EFFORTS.

Programmers have urged the Commission to provide a degree of flexibility in the rules and timetables adopted in this proceeding. Some commenters have suggested that, for example, any enforcement proceedings avoid imposing sanctions on de minimus violations of the rules, 3/ or that compliance be based on a percentage of total programming. 4/ As the Commission acknowledged in its initial *Notice*, there may be other ways to provide flexibility and, at the same time, maximize the existence of captioned programming.

As Programmers suggested in the initial comments, one option is to provide credit for an MVPD's overall efforts in providing programming. Thus, while network by network certification of compliance is an administratively feasible way to proceed, the Commission should structure its enforcement rules to provide credit for aggregate efforts. Where there is a complaint regarding a particular network, an MVPD's overall efforts should be taken into account. 5/

The Commission should also acknowledge voluntary efforts at the network level, and provide "good actor" credit for programming that has been voluntarily

3/ E.g., NCTA Comments at 12-13.

4/ E.g., HBO Comments at 9-12.

5/ The Commission has suggested, for example, that "a cable system could meet its obligations solely by passing through the captioned programs of the broadcast stations it carries." *Closed Captioning and Video Description of Video Programming, Notice of Proposed Rulemaking*, FCC 97-4 (released Jan. 17, 1997) ("Notice") at ¶ 43.

captioned. This would serve two important functions. First, it would provide an important degree of flexibility in enforcing the rules. 6/ Second, such credit would provide an incentive for cable networks to continue airing captioned programming produced before the effective date of the rules, and not to "backslide," as some commenters have suggested might occur. Such an approach would serve the dual interests of flexibility as well as maximizing closed captioned programming.

III. THE COMMISSION SHOULD EXPRESSLY REJECT ANY CAPTIONING REQUIREMENTS FOR INTERNET PROGRAMMING.

Several commenters suggested that the FCC should adopt captioning requirements for video programming provided over the Internet. 7/ The Commission should flatly reject these proposals and make clear in its Order that it does not have the authority to regulate programming content on the Internet.

Nothing in Section 713 suggests that the Commission has gained jurisdiction over this new medium. Although the Section is non-specific as to the entity subject to regulation, Congress clearly was contemplating the existing programming market and current existing transmission media for providing such programming. 8/

6/ For example, if a particular network fell somewhat short of its captioning requirements for new programming, its previous voluntary efforts to provide closed captioning should be credited toward compliance. The Commission might establish some limits to govern this practice (e.g., "good actor" credit will be given only where a network achieves 80 percent of the requirement for new programming and can demonstrate overall compliance with existing programming).

7/ See Comments of the National Association of the Deaf at 3; Comments of the League for the Hard of Hearing at 2; Comments of Kaleidoscope Television at 5.

8/ For example, the inquiry required by Section 713(a) directed the Commission to examine "the extent to which existing or previously published programming is closed

There is nothing to suggest that Congress had any such broad expansion of jurisdiction over new media in mind.

Moreover, any such requirement would be contrary to the balanced approach of Section 713 because it would significantly hamper the development of new media forms and programming. Internet video exists only in a relatively primitive form and it is thus far uncertain the extent to which existing web-based services will be commercially viable. Indeed, the current prospects for commercial publishing on the World Wide Web are far from certain. Two web sites considered the most popular of their kind recently were shut down. Most notably, *Politics Now*, a collaboration of ABC News, National Journal, Inc., and the Washington Post closed its site in the past week because the growth of Internet advertising has been too slow.^{9/} Most major companies sponsoring web sites are losing millions of dollars. Even the site jointly sponsored by NBC News and Microsoft Corporation is not expected to be profitable for at least another four to five years.^{10/} One analyst has predicted that up to 80 percent of such web-based ventures could fail financially.^{11/}

captioned, the size of the video programming provider or programming owner providing closed captioning, the size of the market served, the relative audience shares achieved, or any other related factors. The legislative history stated that the term "provider" of video programming "refers to the specific television station, cable operator, cable network or other service that provides programming to the public." Conf. Rpt. 104-458, 104th Cong., 2d Sess. 183 (Jan. 31, 1996).

^{9/} Seth Schiesel, *Some Media Organizations Pulled the Plug on Web Sites*, NEW YORK TIMES CYBERTIMES (Mar. 25, 1997) (<http://search.nytimes.com/web/docsroot/library/cyber/week/032597shakeout.html>).

^{10/} *Id.*

^{11/} *Id.*

Both Ovation and A&E Television currently maintain web sites. The Ovation site 12/ provides information about Ovation, highlights and schedules, describes certain features, provides links to other sites on the Web (in the areas of art, dance, film, literature, museums, arts publications, music and theater) and has a gift shop. A&E maintains web sites for both the A&E Network and The History Channel. The A&E site 13/ includes TV listings, an A&E quiz, the A&E Classroom, behind the scenes information on original productions and the A&E Store. The THC site 14/ includes an events calendar, the History Classroom, exhibits (an on-line museum), real audio clips from great speeches, a History hotlist (with links to information about various periods in history), TV listings and the History Store. Most notably, the THC web site includes a feature called "This Day in History" which contains a brief video clip.

Any obligation imposed on Internet programming in this proceeding will only forestall the development of such programming and could hasten the demise emerging Internet services. From a legal standpoint, such requirements are beyond the law's mandate. From a policy perspective, such requirements would be utterly antithetical to the Commission's goal of maximizing captioned programming without unduly affecting the industry. In any event, since the vast majority of information

12/ See <http://www.ovationtv.com>.


13/ See <http://www.aetv.com>. A&E also hosts a Biography web site (<http://www.biography.com>).

14/ See <http://www.historychannel.com>. A separate site for THC is available through America Online.

already available on the World Wide Web is both text and graphics based, any such requirement is unnecessary.

Respectfully submitted,

A&E TELEVISION NETWORKS
AND OVATION

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Dated: March 31, 1997

Appendix

Comments of A&E Television Networks and Ovation

- **Captioning Requirements Should Not Involve the Commission in Micromanagement of Programming Practices.**
 - The rules should not dictate precisely what types of programming needs to be captioned by when;
 - The Commission should not designate certain types of programs (e.g., live local news or public affairs programming) for earlier implementation;
 - The Commission should not require reformatting when a network edits a program that previously included captions, so long as the timetable is otherwise being met;
 - Programmers agree with the Commission's tentative conclusions not to establish technical standards and to employ an informal complaint process;
 - Captioning various types of musical performances raises the threat of micromanagement, and suggests that rules could be implemented that would be particularly threatening to a service such as Ovation; The FCC should avoid this problem by exempting "performance-oriented" programming as a class.
- **Captioning Requirements Should Be Consistent With The Commission's Historic Grant of Jurisdiction.**
 - Responsibility for compliance should rest with the cable operator or other licensed video program distributor;
 - The Commission should allow an MVPD to certify compliance with the schedule established by these rules to the extent the programming services it carries have certified to it that they have captioned the requisite amount of non-exempt programming. Any MVPD that has received such assurances would be in good faith compliance with the rules;
 - While it is administratively necessary to measure compliance channel by channel as a general matter,

MVPDs should receive credit for the years voluntary initiatives, bolstered by government funding, that produced a large amount of captioned material in advance of the new timetable;

- If a complaint is filed against any MVPD and any particular network's efforts fell short of the requirements, no penalty should be assessed if the MVPD's overall efforts showed that it is on track toward meeting the FCC's schedule;
 - Compliance with captioning requirements should be measured on an annualized basis, rather than weekly, monthly, or some other period;
 - The FCC should prohibit contracts that would impose discriminatory obligations on unaffiliated networks.
- **The Timetable for Implementing Captioning Requirements Should Realistically Balance Competing Public Interest Needs.**
- The Commission should implement a 10-year initial implementation period rather than an eight-year phase-in;
 - Implementation should be more gradual in the initial phases, as existing programming contracts run their course, and should save the more rigorous requirements for the end of the resulting timetable;
 - Because compliance will be more difficult in the initial stage of the schedule, the Commission should avoid a rigid initial obligation. After three years, the Commission should conduct an inquiry followed by a report to ensure that the industry is on track toward captioning 25 percent of non-exempt programming;
 - The Commission should modify the timetable to account for the practical reality that initial implementation will be more difficult. The requirement could be 40 percent after five years, 65 percent after seven years and 100 percent after ten years;
 - The rules should not establish a timetable for captioning of library programming.

- **The Commission Should Adopt Exemptions From The Captioning Requirements That Take Into Account the Particular Economic Situations of the Affected Industries.**

- The Commission should reconsider its tentative decision not to create any blanket exemptions;
- The Commission should exempt new networks from captioning requirements. An MVPD should not be required to count the programming on a new network toward its captioning obligation until five years after launch;
- The Commission should consider some specific programming types for blanket exemptions (e.g., "wrap-arounds," non-commercial, educational programming, performance-oriented programming);
- The Commission should exempt all existing programming contracts that do not affirmatively provide for closed captions;
- With respect to individual "hardship" exemptions under Section 713(e), the rules should implement congressional intent that such relief should be available when necessary;
- One relevant factor in the administration of hardship exemptions should be the continuing existence (or not) of government funding.